LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
FEB 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1366

JACK W. BAUM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 7TH CIRCUIT

DAVID P. SCHIPPERS,
JOSEPH A. LAMENDELLA,
79 West Monroe Street,
Chicago, Illinois 60603.
Attorneys for Petitioner.

SCHIPPERS, BETAR, LAMENDELLA AND O'BRIEN,
79 West Monroe Street,
Chicago, Illinois 60603,
236-5517,
Of Counsel.

KEENAN PRINTING COMPANY

INDEX

	Page
Petition for Writ of Certiorari	1
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes and Rules Involved	2, 3
Statement of the Case	4
Reasons for Granting the Writ	6
Appendix	
Opinion of the Court of Appeals	17
Judgment and Order of the Court of Appeals Denying the Petition for Rehearing	29

List of Authorities Cited

Benton v. *United States*, 233 F. 2d 491 (4th Cir., 1956)	9
Cochran v. *United States*, 310 F. 2d 585 (8th Cir., 1962)	9
Glasser v. *United States*, 315 U.S. 60 (1942)	15
Greer v. *United States*, 245 U.S. 559 (1918)	9
Guy v. *United States*, 107 F. 2d 228 (D.C. Cir., 1939), *Cert. Den.*, 308 U.S. 525	14
Michelson v. *United States*, 335 U.S. 469 (1948)	7, 10
Ross v. *United States*, 353 F. 2d 454 (D.C. Cir., 1965)	14
United States v. *Costner*, 359 F. 2d 969 (6th Cir., 1966)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

JACK W. BAUM,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, JACK W. BAUM, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the 7th Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the 7th Circuit, not yet reported, affirming the judgment of conviction below, is attached as Appendix "A".

STATEMENT OF JURISDICTION

The petitioner, JACK W. BAUM, appealed his conviction in the United States District Court for the Northern District of Illinois to the United States Court of Appeals for the 7th Circuit. On December 28, 1970, the United States Court of Appeals for the 7th Circuit affirmed the judgment of conviction. A petition for re-hearing was thereafter filed and on January 19, 1971, the United States Court of Appeals for the 7th Circuit denied said petition (Appendix "B").

On February 1, 1971 the mandate of the United States Court of Appeals for the 7th Circuit was stayed for a period of 30 days in accordance with the provisions of Rule 41(b), of the Rules of that Court.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial court committed prejudicial error in permitting the prosecution to elicit testimony concerning the defendant's character; to seek a witnesses' personal opinion as to the defendant's character and to dwell upon the defendant's character regardless of the fact that the defendant never put his general character in issue in the cause.

2. Whether the accumulation of trial errors operated to deny the petitioner a fair trial.

STATUTES INVOLVED

Title 18, Sec. 371, U.S.C.A. states:

371. **Conspiracy to Commit Offense or to Defraud United States**

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than 5 years or both."

Title 26, Sec. 7206, U.S.C.A. states, in relevant part:

7206. **Fraud and False Statement**

"Any person who . . .

* * *

(2) **Aid or Assistance:**

Wilfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the Internal Revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years or both, together with the costs of prosecution."

STATEMENT OF THE CASE

The defendant was charged in three counts of a six count indictment. Count I charged that the defendant and others conspired to attempt to evade Federal income taxes due and owing to the United States from one Charles A. Hansen, Deceased. Count II charged that the defendant and another obstructed and impeded the administration of the Internal Revenue laws of the United States and that they offered, promised and gave the sum of Three Thousand Dollars to an Internal Revenue Agent as a bribe. Count III charged that the defendant aided, assisted, counseled, procured and advised the appropriation and presentation of a false Internal Revenue Agent's Report. Petitioner's trial commenced on January 13, 1969, and resulted in January 21, 1969, in a jury verdict of guilty as to Counts I and III, and innocent on Count II. Petitioner was sentenced to the custody of the Attorney General for imprisonment for a period of 3 years and fine of $5,000. Notice of Appeal was filed on April 14, 1969.

Jack W. Baum was an attorney who primarily engaged in the practice of preparation of federal income tax returns. During the years 1956 through 1961, he prepared between 300 and 500 returns a year. Among his clients was a mason contractor by the name of Charles Hansen. Baums' duties for Hansen included preparation of quarterly and annual payroll tax returns; W-2 Forms; and federal income tax returns. He was paid $360.00 per year and in one year he received $480.00 for the work performed for Hansen. In order to prepare the income tax returns, Baum was furnished a worksheet by Hansen's bookkeeper, Louis Strobl. Mr. Strobl kept Hansen's books from 1953 until Hansen's death in 1965. Strobl kept the

books on a part-time basis, approximately 20 hours a week, for which he received $2.00 an hour and free room and board at the Hansen's home. His duties included keeping the payroll journal, cash receipts and disbursements journal, maintaining the general ledger and preparing a worksheet at the end of each year summarizing income and expenditures for use in preparation of the tax return. During the period 1956 through 1960, no one except Mr. Strobl kept Mr. Hansen's books.

It was disputed during the trial as to whether or not Baum had possession of the books and records of Hansen, when he prepared the tax returns for the year 1956 through 1960.

During the summer of 1961, a Revenue Agent by the name of Guy F. Parker, was assigned the job of auditing 1958, 1959 and 1960 federal income tax returns of Charles A. and Theresa Hansen. The audit was conducted at the Chicago offices of Jack Baum at 541 West Diversey Avenue. Louis Strobl brought Hansen's books and any records requested by the Revenue Agent to Baum's office for the audit. Parker completed his audit in August of 1961, and wrote a revenue agent's report in September of 1961, wherein he assessed deficiency against Hansen of approximately $20,000. In the revenue agent's report, Parker indicated that Hansen stated the deficiency was caused by the omission of receipts from construction contracts. The transmittal letter of the report (the confidential portion of the revenue agent's report which is not received by the taxpayer) stated that "unreported income was the result of jobs not included in the returns, although all, or most of contract prices had been received by the taxpayers. Mr. Hansen stated that the jobs were omitted from the returns because of litigation in each instance involving death or

injury to one of his employees; that he believed, and Louis Strobl his part-time bookkeeper, and Jack W. Baum, his attorney and preparer of the returns, agreed with him that no income should be reported nor costs claimed on those jobs until they were fully settled."

A judgment of conviction of the United States District Court was appealed to the Court of Appeals for the Seventh Circuit. The defendant alleged as error, inter alia, that he had been unduly prejudiced by the admission into evidence of testimony concerning the defendant's general bad character at a time when character was not in issue; and that the compilation of errors in the record below had effectively denied him a fair trial.

The Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court and held that the defendant had not been deprived of a fair trial on the basis of the errors asserted. As regards the character testimony, the Court of Appeals reasoned that no answer had been made to the question dealing with Parker's impression of Baum's character in that the matter had been dropped by the government. The Court further reasoned that there could have been no prejudice which would warrant a new trial under the circumstance (Appendix "A").

REASONS FOR GRANTING THE WRIT

The petitioner respectfully submits that the two questions posed by this Appeal, to wit: (1) Whether the trial court committed prejudicial error in permitting the prosecution to elicit testimony concerning the defendant's character, to seek a witnesses' personal opinion as to the defendant's character and to dwell upon the defendant's

character regardless of the fact that the defendant never put his general character in issue in the cause, and (2) Whether the accumulation of trial errors operated to deny the petitioner a fair trial, are manifestly substantial questions of law and call for resolutions by this Honorable Court.

1. The decision of the 7th Circuit Court of Appeals is diametrically opposed to the holding and reasoning of this Court in *Michelson* v. *United States,* 335 U.S. 469 (1948).

Although he took the stand in his own defense and therefore placed his reputation for truth and veracity in issue, at no time during the course of the trial did the defendant make any direct or indirect allusion whatsoever to his general character. Consequently that character was not an issue in the case. Nevertheless the Government elected overtly to elicit direct testimony concerning the defendant's bad character. Even worse, the evidence offered ignored the defendant's reputation, and rather focused upon one witnesses' mere personal opinion of character as allegedly communicated to an Investigative Agent several months prior to the trial of the case.

More specifically, during the presentation of his case in chief, the defendant called as a witness in his behalf one Guy Parker, his co-defendant. Mr. Parker is the person who was alleged to have been bribed by the defendant and whom the defendant is alleged to have conspired with and aided and abetted in filing a false Internal Revenue Agent's report.

On direct examination, Parker testified merely that neither the defendant Baum nor anyone else connected with matter on his behalf had ever hinted at bribery or offered to pay the witness. He was not asked, nor did he

volunteer any opinion of the defendant's character; and gave no hint that he was even acquainted with the defendant's reputation in the community in which he lived or worked.

During cross-examination, the prosecutor chose to ignore the direct examination; and made no attempt at all to impeach any of the statements made on direct, not even that specific statement made by Mr. Parker that he never received a bribe or an offer of bribe from the defendant.

Instead the witness was asked whether he had exer expressed his personal opinion that the defendant was the type of person who would manipulate figures even if a tax payer wanted to file an honest return. When that line of questioning was pursued further, counsel for the defendant objected and noted to the Court that he would have a motion to make later. The objection was overruled. The prosecutor then resumed his attempts to secure the witnesses' opinion as to the likelihood that the defendant would commit the crimes for which he had been charged.

Finally, not content with innuendo, the prosecutor specifically asked Mr. Parker: "And didn't you also state with reference to Baum to Inspector Weber that this was your impression of Baum's character? Well, I should re-phrase it. The fact that he would manipulate figures and would have connived, in this case, that was your impression of his character?"

At this point, the defense counsel again objected and asked to be heard at the side bar. Without any hearing at all the objection was perfunctorily overruled. The defense later moved for a mis-trial. The witness did not answer the last question, but the inflammatory and prejudicial statement had been placed before the jury.

During the subsequent cross-examination, the witness was asked whether he had told the Inspector that Mr. Baum was the kind of person who would asked someone to bribe an agent; whether he told Inspector Weber that: "Baum was the type of person that if a tax-payer wanted to file an honest return, Baum would manipulate the figures on the return; and whether he had told the Inspector that if there was any "monkey business" it resulted from "the bookkeeper's mistakes and Baum's connivances". All those questions were answered by the witness over objection.

It is readily apparent even to the most casual observer that the great proportion of the Government's cross-examination of the witness Parker was aimed not at eliciting probative evidence, nor at impeaching his direct testimony, but rather at conveying to the minds of the jury the witnesses' personal opinion that the defendant possessed character traits that made him more likely to be the type of person to have committed the crimes for which he was on trial. For the trial court to have allowed such a prejudicial and inflammatory course of conduct by the prosecution was to ignore the specific mandate set forth by this and other American courts.

It is a virtually unchallenged precept of Anglo-American jurisprudence that the question of the character or reputation of the defendant is not, and cannot be an issue in the case. Evidence thereof may not be introduced by the prosecution until such time as the defense has itself offered evidence of good character. *Greer* v. *United States,* 245 U.S. 559, 560 (1918); *United States* v. *Costner,* 359 Fed. 2d, 969, 974 (6th Cir., 1966); *Cochran* v. *United States,* 310 Fed. 2d 585, 589 (8th Cir., 1962); *Benton* v. *United States,* 233 Fed. 2d 491, 493 (4th Cir., 1956).

The rule was succintly and unequivocably stated by this Court in *Michelson* v. *United States,* 335 U.S. 469 (1948), at pages 475, 476:

> "Courts that follow the common law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, *Greer* v. *United States,* 245 U.S. 559, 38 S. Ct. 209, 62 L. Ed. 469, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts may logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over persuade them as to pre-judge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

The Government's interpretation of the importance of Mr. Parker's opinion is perhaps best demonstrated by the fact that it chose, over objections and another motion for a mis-trial, to question Inspector Weber later in the trial concerning the same questions and answers that had been previously put to the witness Parker. This was compounded by the fact that the witness should not have originally been permitted to give a personal opinion as to character traits in the first place. *Michelson* v. *United States,* 335 U.S. 469, 482 (1948).

Moreover, so that there could be no mistake as to the inference intended and to heighten the prejudicial effect, the Assistant United States Attorney, in his final argument, directly referred to Mr. Parker's opinion and suggested that the jury agree with him that "Baum was the kind of guy who would manipulate an income tax return."

The effect was devastating. Mr. Parker had been called as a defense witness. Furthermore, he was the person to whom the defendant had allegedly offered a bribe. Yet under direct examination, Parker denied ever receiving a bribe or an offer of a bribe from the defendant. The testimony of that witness must have been given great credence by the jury as witnessed by the fact that it acquitted on the bribery charge. His opinion, then, as to Baum's character must have carried at least equal weight with the jury and could have been the difference in the verdict.

It is respectfully submitted that the result of that character evidence upon the ultimate verdict was precisely as predicted by this Honorable Court when it refused to permit such testimony until the issue had been opened by the defense.

2. In an obviously close case, the record is so infested with error and prejudice as effectively to deny the Petitioner even a semblance of the fair trial to which he was entitled.

The case was extremely close. The evidence as to the guilt or innocence of the defendant was finally balanced and teetered precariously throughout the trial. As a matter of fact, the jury chose to acquit on the charge of bribery, unquestionably the most serious count in the indictment, and the count to which virtually all of the Government's evidence was addressed. Nonetheless the jurors

were repeatedly assaulted with prejudicial, inflammatory and highly improper testimony and comments. It is respectfully submitted that any of the individual asserted errors would in itself have been of sufficient significance to constitute a denial of a fair trial. The cumulative effect of all those errors was such as to render virtually impossible a fair and impartial hearing.

At the very outset the aura of impartiality was destroyed when the prosecutor was asked to summarize the indictment. He proceeded to summarize and paraphrase the indictment for some 15 minutes, and included counts having to do solely with the co-defendant, Parker, who had previously been severed.

The defense was refused when it requested the tax returns of three critical government witnesses.

Counsel attempted to ascertain whether a state judge who had sentenced the Government's chief witness had been told that the witness was cooperating with the Government. Even though the area of the question was perfectly legitimate in order to show bias or interest. The judge not only sustained the objection, but, by his comments, indicated to the jury that defense counsel had acted improperly and in a reprehensible manner.

The Court assisted in cross-examination of the defendant in such a way as to cast ridicule upon the defendant's candor and ability.

During the closing argument to the jury, the prosecutor made repeated personal remarks concerning the defense attorneys in an effort to influence, inflame and prejudice the jury against their clients.

The Court refused to grant a short continuance so that the defense's expert witness would have an opportunity to

examine the documents that had been introduced by the prosecution.

The Government's expert witness was permitted to invade the province of the jury and to give testimony on matters not properly the subject of expert testimony.

The Court restricted the cross-examination of prosecution witnesses and restricted the presentation of the defense case. In this regard, the defense was precluded from determining whether the chief Government witness expected to go to jail for his part in the conspiracy that formed the basis for the indictment; what his sentence had been in a state criminal charge at a time when he was cooperating with Government Agents; and whether he, or anyone in his behalf had called to the attention of the sentencing judge in the State Court the fact that he had been cooperating with the Federal Government.

The defense was precluded from questioning a key witness for the prosecution concerning a prior inconsistent statement. Furthermore, the error was compounded when the trial judge took pains to explain at some length why, in his opinion, the statements were not inconsistent. The Court even went so far as to indicate that the testimony before the jury was the only statement that should be given any credence.

Likewise the defendant's case in chief was hampered by the trial court. A few examples will serve to illustrate: The defendant called witnesses as to the bad reputation for truth and veracity of Government key witnesses. In each case the Court would not permit the witness to give his opinion as to whether or not he would believe the subject under oath. The defendant requested that the Government furnish tax returns of the key government witness, in an attempt to show a further motive to falsify his testimony. The requests were denied.

Finally, and perhaps most illustrative, of the entire aura of unfairness surrounding the case, was the matter of Government Exhibit 31. That Exhibit consisted of a personnel card for Guy Parker, the co-defendant. The prosecutor asked the qualifying witness to tell the jury whether the exhibit showed that Parker had resigned, and the witness testified that it so showed. The Court refused to let the defense cross-examine concerning other notations on the same document. The Court further refused to permit the defense counsel to read part of the document to the jury which explained the nature and circumstances surrounding Mr. Parker's resignation. That request too was denied despite the fact that the Exhibit had been admitted into evidence. At last, when the time came for the evidence to be sent to the jury room, Exhibit 31 was withheld, the only exhibit in evidence that was not given to the jury.

Had there been sufficient competent evidence clearly to establish the guilt of the defendant, the test to determine whether or not testimony might have been prejudicial would be more stringent, *Guy* v. *United States,* 107 F. 2d 228 (D.C. Cir., 1939), cert. den., 308 U.S. 525. However, the relative strength of the evidence against a defendant is certainly a relevant factor in weighing whether the errors at trial were such as to require reversal. *Ross* v. *United States,* 353 Fed. 2d 454 (D.C. Cir., 1965). This is especially true where, as here, the tiniest agate of error might have been sufficient to swing the already tottering balance between innocence and guilt.

> "In all cases the constitutional safeguards are to be zealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then

error, which under some circumstances, would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." (*Glasser* v. *United States*, 315 U.S. 60, 67 (1942)).

CONCLUSION

For the reasons stated, it is respectfully prayed that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the 7th Circuit in this cause.

Respectfully submitted,

DAVID P. SCHIPPERS,

JOSEPH A. LAMENDELLA,
79 West Monroe Street,
Chicago, Illinois 60603.

Attorneys for Petitioners.

SCHIPPERS, BETAR, LAMENDELLA AND O'BRIEN,
79 West Monroe Street,
Chicago, Illinois 60603,
236-5517,

Of Counsel.

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 17690

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JACK W. BAUM,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

December 28, 1970

Before CASTLE, *Senior Circuit Judge,* KILEY and CUMMINGS, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* Defendant was charged in three counts of a 6-count indictment alleging violations of the Internal Revenue and Criminal Codes. A jury found him guilty under Counts I and III, and he received concurrent sentences of three years' imprisonment.

The first count charged that defendant, Guy F. Parker, and Samuel A. Carmel conspired to attempt to evade the federal income taxes of Mr. and Mrs. Charles A. Hansen for 1956 through 1960. As part of the conspiracy, the grand jury alleged that defendant prepared fraudulent income tax returns for the Hansens in those five

years. This court asserted that the conspirators violated the general conspiracy statute (18 U.S.C. § 371) by combining to attempt to evade the taxes of the Hansens, as proscribed by 26 U.S.C. § 7201.

Count III charged that about August 4, 1961, defendant procured a revenue agent's report which fraudulently stated that income had been omitted from the 1958, 1959, and 1960 tax returns of Mr. and Mrs. Hansen "because of litigation due to injury or death of employees on the [contract] jobs from which the income was received" in violation of 26 U.S.C. § 7206(2).[1]

Prior to trial, the district court ordered the Government to produce a copy of the revenue agent's report and related working papers for the years 1956 through 1960 and the federal income tax returns of the Hansens for those years. The Government was also required to disclose their corrected taxable income and corrected tax liability. Pursuant to a subsequent pretrial order of the district court, the Government also disclosed all of Hansen's books and records in its possession.

The evidence shows that defendant was an attorney primarily engaged in the preparation of federal income tax returns. One of his clients was a mason contractor named Charles Hansen, and defendant prepared Mr. and Mrs. Hansen's federal income tax returns for the years in question.

In the summer of 1961, almost daily until some time in August, Internal Revenue Agent Guy F. Parker was auditing income tax returns of the Hansens in defendant's office. At that time, defendant told William F. Stromburg, an office associate, that Parker was going to retire and that defendant was going to give him a going-away present. In early 1963, Stromburg read Parker's Septem-

ber 21, 1961, report of his examination of the Hansens' income tax liability, which stated that "receipts were erroneously omitted because of litigation on [contract] jobs on which the amounts were received" during the calendar years 1958, 1959, and 1960. Defendant laughed when Stromburg remarked that the reason for the omission of that income was a lot of nonsense. When Stromburg asked defendant how he was planning to skirt the fraud penalty, defendant said, "[t]hat is none of your business and keep your mouth shut about it." At a 1963 meeting attended by Stromburg, defendant, and Hansen concerning further Hansen tax difficulties, Hansen remarked, "I don't want any bribing in this one," and defendant replied that Stromburg would not "know how to do these things anyway."

Stromburg testified that he received Hansen's income tax records in 1965 because he was then in charge of preparing the Hansens' income tax returns. Stromburg noticed that a working paper was missing covering the years 1958 through 1960. He stated that as to each of those years, it had a figure, and the total of the three figures was about $21,000. Underneath the total a penalty was shown for more than $10,000. These two figures were then totaled to show $32,000. Parker's report showed that the amount of income that the Hansens omitted for those three years was $34,824.80 and that their unreported income tax liability was about $20,000. Parker did not as-

---

[1]Defendant was acquitted under Count II, which charged that he and Samuel Carmel endeavored to give $3,000 to Revenue Agent Guy F. Parker to conceal fraudulent omissions of income from the 1958, 1959, and 1960 federal income tax returns of Mr. and Mrs. Hansen.

sert any fraud penalties. If Parker's report had not been distorted, the Hansens' total tax and fraud penalty liability would have been about $33,000, approximately resembling the total amount shown in the working paper.

Victor Berke, also a business associate of defendant, testified that he saw defendant hand Parker a white envelope in the summer of 1961. Defendant then told Berke that he just got through paying for settling his contractor client's case and had fixed it so that it would not go any further, with Hansen off the hook. In that same summer, defendant and his business associate, Samuel Carmel, met with Hansen, who expressed his concern with respect to the audit of his income tax returns. Defendant informed Carmel about the omissions of Hansen's income and told Hansen not to worry because defendant would do anything to make sure that Hansen had no problems. A few days later, defendant remarked to Carmel that Agent Parker would be almost blind not to find the omissions while going through Hansen's tax returns. Subsequently, defendant told Carmel that Parker had found various omissions in the returns, and defendant asked Carmel to "attempt to reach" Parker.

On August 3, 1961, Carmel was in defendant's office when Hansen gave defendant $3,000 in large denominations after cashing a check at the Belmont National Bank. Defendant returned the money to Hansen when Hansen admitted that his bookkeeper would see the check. The money was redeposited on August 4, and Hansen then gave defendant a package containing $3,000 in smaller bills. Defendant said that Carmel and he would then take care of the matter, but Carmel refused to participate, even though Hansen offered him "a couple of hundred."

The next day, defendant told Carmel that Parker could use a loan of $2,000 or $3,000, and Carmel agreed to make such a loan. Later in the day, Carmel told defendant to handle the matter instead. A few days later, the defendant told Carmel that he had paid Parker with cash, the Hansen audit cost an additional $21,000 in taxes, defendant had saved Hansen $7,000 to $8,000 in additional taxes, and that no penalty for civil or fraud charges would be brought against Hansen. A few years later, defendant told Carmel to forget what he knew about this matter.

In a September 21, 1961, transmittal letter to one of his superiors, Parker reported that $34,824.80 unreported income of the Hansens was the result of [contract] jobs not included in the 1958-1960 returns, although most of the prices for the work had been received by the taxpayers. Parker then reported:

> "Mr. Hansen stated that the jobs were omitted from the returns because of litigation in each instance involving death or injury to one of his employees; that he believed, and Lou Strobl, his part time bookkeeper and Jack W. Baum his attorney and preparor of the returns, agreed with him, that no income should be reported nor costs claimed on those jobs until they were fully settled."

Parker added that such jobs were included in the corrected figures in his report but that no penalty was being asserted "because it was considered that the omission of the jobs in litigation was honest error and not negligence nor wilful disregard of code and regulations." One of Parker's penciled worksheets attached to the transmittal letter was entitled "Cash Receipts (Per Ck. Stubs)" for November 5, 1958, until October 15, 1959. Underneath the Comment column, at the bottom of the right-hand side

of this page, Parker penciled "(Per Baum's W.S. [Worksheet])."

It was stipulated that there was no litigation against Hansen for employee injury or death, even though both Parker's transmittal letter and report stated that Hansen had omitted income for this reason. This subject had been discussed by defendant Hansen and Baum, as shown by both those documents. Although it was improper practice for a revenue agent to accept such an omission explanation without verification, no verification had been obtained by Parker. Hansen's books never contained an account relating to jobs on which employees were injured or killed, nor did he ever make a payment for such an injury. Furthermore, he had Workmen's Compensation and general liability insurance for the relevant years.

I

Defendant asserts that the conspiracy count, stated in Count I of the indictment, should have been dismissed because it related to the taxable years 1956 through 1960, whereas the indictment was not returned until August 1, 1967, after the deaths of coconspirator Charles A. Hansen and his wife, Theresa.

Defendant first argues that the six-year statute of limitations applicable to Count I under 26 U.S.C. § 6531 (8) should have barred prosecution of that portion of the indictment. He urges that the conspiracy was completed no later than April 15, 1961, the due date for filing the 1960 income tax returns. See *United States* v. *Habig,* 390 U.S. 222. Since the indictment was not returned until August 1, 1967, more than six years after the due date for the final return, the limitations period would have elapsed.

We reject this argument. The conspiracy charged in Count I was not confined to the submission of fraudulent returns covering the years in question. It included the avoidance of fraud and penalty assessments which might arise as a result of subsequent government investigation. The conspiracy included Agent Parker, the internal revenue agent investigating these returns, and the Government charged overt acts on the part of the conspirators culminating September 29, 1961, directed toward securing acceptance of the fraudulent returns. Consequently, the indictment was returned within the statutory period of limitations. See *Grunewald* v. *United States,* 353 U.S. 391, 406 *et seq.*

Alternatively, defendant suggests that the trial court erred in failing to dismiss Count I pursuant to Rule 48(b) of the Federal Rules of Criminal Procedure because of alleged prejudicial delay in presenting the case to the Grand Jury.[2]

It is true that an accused is entitled to dismissal of an indictment if he proves that he has been sufficiently prejudiced by an unnecessary and unreasonable pre-indictment delay. *United States* v. *Lee,* 413 F. 2d 910, 912-914 (7th Cir. 1969), certiorari denied, 396 U.S. 1022. In this case, however, the Government did not discover defendant's "clandestine activities" until 1966. The nature of the conspiracy was, moreover, sufficiently complex as to necessitate careful investigation reasonably consuming

---

2. Rule 48(b) states that

"[i]f there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

considerable time. We are also unpersuaded by defendant's claims of prejudice. Although defendant's files relating to the Hansens' taxes were destroyed by his secretary in March 1967, after Hansen's demise, both the Government and defendant had access to Hansen's bank deposits and disbursement for the years in question. The cash receipts were reconstructed from these records. Prior to trial, the Government also produced the pertinent tax returns, Parker's report and work papers, as well as the Government's computation of the corrected tax liability. Assuming that defendant's destruction of his own work papers at that time was reasonable and justifiable, there is no indication of serious prejudice resulting to his case from that act.

II

Defendant also charges that the evidence proving Count I was deficient because the Government failed to prove the existence of additional taxes due during the years here involved. Cf. *Willingham* v. *United States,* 289 F. 2d 283 (5th Cir. 1961), certiorari denied, 368 U.S. 828. We find this contention meritless.

The Government may prove tax evasion by showing that the accused "had income in the years in question which he, with intent to evade payment, failed to report." *Kowalsky* v. *United States,* 290 F. 2d 161, 165 (5th Cir. 1961), certiorari denied, 368 U.S. 875. This may be shown through overstatements of expenses as well as the omission of income. *United States* v. *Keenan,* 267 F. 2d 118, 123 (7th Cir. 1959), certiorari denied, 361 U.S. 863. The Government may employ any available method to establish those facts. *United States* v. *Doyle,* 234 F. 2d 788, 793 (7th Cir. 1956), certiorari denied, 352 U.S. 893.

In the instant case, the Government proved evasion both circumstantially and through direct evidence. There was testimony from witnesses indicating that $34,000 income was omitted from the taxpayers' returns for 1958, 1959, and 1960. Defendant himself admitted the omission of Hansen income, and the evidence established that the omission was not justifiable on the grounds stated in Agent Parker's report. Moreover, there was testimony disclosing substantial overstatement of expenses. There was, therefore, ample evidence from which the jury could conclude that taxes were evaded during the years in question.

III

Defendant next charges that the evidence was insufficient to support a conviction for proving a false report as charged in Count III of the indictment. To support his claim, defendant relies primarily on that part of Parker's transmittal letter reporting to his superior that "Mr. Hansen stated that the jobs were omitted from the returns because of litigation in each instance involving death or injury to one of his employees." Since Hansen died prior to the trial, defendant argues that the Government could not prove Parker's statement was false. However, Stromburg's testimony alone shows that this was a false statement. This was corroborated by Carmel's testimony. Finally, Parker's other report of September 21, 1961, sent to defendant and also seen by Stromburg, did not refer to any Hansen statement but merely said that "receipts were erroneously omitted because of litigation on [contract] jobs on which the amounts were received" during these three years. The evidence showed this was

demonstrably false and that defendant procured the report, thus giving ample support to the conviction under Count III.

IV

Numerous additional objections have been raised concerning the conduct of the trial. Initially, defendant contends that the prosecution was permitted to elicit testimony concerning defendant's character at a time when that issue was not a proper subject. We find this assertion incorrect.

On direct examination during defendant's case, Parker denied that defendant ever offered him money. The Government then cross-examined Parker about certain prior statements he made to Inspector Weber in June 1967. The defendant now asserts that a new trial should be ordered because these statements reflected on defendant's character. Although defendant's objection was summarily overruled, no answer was ever made by the witness to the question dealing with Parker's impression of Baum's character, and the matter was dropped by the Government. Under the circumstances, we see no prejudice that would warrant a new trial. Moreover, the remaining inquiry regarded the prior statements to Weber inconsistent with the witness' preceding testimony on cross-examination that he did not believe that defendant was capable of attempting bribery and had offered him no money. Cf. *Benson* v. *United States*, 402 F. 2d 576, 581 (9th Cir. 1968). Therefore, the motion for mistrial made on the next trial day was properly denied.

V

During the trial, the defendant twice sought continuances to consult with an expert accountant about the Government's documentary evidence. He now complains that the court's denial of those motions deprived him of the ability to prepare his defense.

The denial of a continuance rests with the sound discretion of the trial court, and it must be judged in light of the circumstances of the particular case. *Ungar* v. *Sarafite,* 376 U.S. 575, 589-590; *United States* v. *Jones,* 369 F. 2d 217, 220 (7th Cir. 1966), certiorari denied *sub nom. Watkins* v. *United States,* 386 U.S. 944. The necessary books and records had been made available to defendant from May 21, 1968, until the trial was convened on January 13, 1969. The district court therefore did not act arbitrarily in refusing these requests.

VI

Defendant has also presented numerous objections to the trial including: (1) the court's refusal to give certain instructions tendered by defendant: (2) testimony by the Government's expert witness which allegedly invaded the province of the jury, and his use of charts and captioned exhibits; (3) refusal to admit defendant's evidence of income from years subsequent to the period of the conspiracy; (4) alleged restrictions upon defendant's cross-examination of several witnesses depriving him of the opportunity for impeachment; (5) the refusal of the court to order production of coconspirator Carmel's tax return and to recall another witness to give testimony on Carmel's character; (6) the court's refusal to send Agent Parker's federal employment record card to the

jury; and (7) several incidental matters including the prosecutor's summation and questions put to defendant by the judge which, in combination with other alleged errors, purportedly deprived defendant of a fair trial.

We find these various complaints unjustified and warranting little discussion. Defendant's instructions were inapposite, and the judge properly covered the relevant matters with more general instructions which did not single out for emphasis unimportant aspects of the Government's case. Similarly, we find no defect in the testimony of the expert witness. His summaries and charts were proper, and the jury was carefully instructed regarding their proper use. The proffered evidence of subsequent tax returns was irrelevant and properly excluded by the judge in this case. Cf. *Bromberg* v. *United States,* 389 F. 2d 618 (9th Cir. 1968). Our review of the transcript persuades us that defendant was not unreasonably restricted in his cross-examination of government witnesses, and we believe the judge was within his discretion in refusing to order the production of coconspirator Carmel's tax return and to recall witness Berke as the court's witness. The court's refusal to send Agent Parker's identification card to the jury was not only justifiable but hardly of any significance in determining the outcome of the trial. Finally, we do not believe that defendant was deprived of a fair trial on the basis of the errors asserted. *Lutwak* v. *United States,* 344 U.S. 604.

The conviction is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
Tuesday, January 19, 1971

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. ROGER J. KILEY, Circuit Judge
Hon. WALTER J. CUMMINGS, Circuit Judge

No. 17690

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

JACK W. BAUM,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1366

JACK W. BAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1970, and a petition for rehearing was denied on January 19, 1971 (Pet. App. B). The petition for a writ of certiorari was filed on February 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government's impeachment of a defense witness, or the cumulative effect of other asserted errors, denied petitioner a fair trial.

420-215—71

STATEMENT

Petitioner, his business associate, Samuel A. Carmel, and an Internal Revenue Agent, Guy F. Parker, were charged in a six-count indictment with offenses relating to evasion of federal income taxes owed by petitioner's client. Petitioner was convicted on two counts, one charging conspiracy to evade the income taxes of his client and one charging that he procured a false report from Agent Parker; he was acquitted on a third charge of obstructing the administration of the internal revenue laws by offering a bribe to Parker. He was sentenced to concurrent three-year terms of imprisonment. In a lengthy and careful opinion, the court of appeals affirmed (Pet. App. A).

In the practice of his primary occupation of preparing federal income tax returns, petitioner, an attorney, prepared returns for a contractor for 1958, 1959 and 1960, which omitted income of $34,824.80 and understated the taxes owed by $17,495.50 (R. 332–333).[1] Petitioner had told the contractor's bookkeeper that, at the insistence of the taxpayer, he would not use the higher income figures shown in the bookkeeper's computations (Tr. 101–102). The returns were subsequently audited by Agent Parker. In the course of the audit, petitioner requested his business associate, Carmel, to attempt to "reach" Agent Parker, pursuant to which Carmel offered Parker a "loan." Carmel then turned matters back to petitioner and told him to handle any payment to Parker. Shortly thereafter, petitioner told Carmel that he had paid Parker in cash and that

[1] "R." references are to the printed Appendix filed in the court of appeals. "Tr." refers to the transcript of testimony.

the audit would be satisfactorily resolved without penalties being assessed against his client (Tr. 488–489, 571–580, 584).

Parker subsequently submitted an official audit report, detailing the understatement of income but attributing it to what he characterized as the contractor's honestly mistaken belief that he should not report income from certain jobs which had given rise to continuing litigation concerning death or injury to his employees (Tr. 370). In fact there was no such litigation, and thus the reported reason for the understatement was false (Tr. 655). Parker did not verify the "explanation," as he was required to do under standard procedures (Tr. 340–348, 655–656). Notwithstanding the large deficiency, Parker did not assess any penalty because of his determination that the income omission was "honest error" and not negligent or willful.

Petitioner called as a defense witness Agent Parker, who was a co-indictee but whose trial had been severed and postponed (Pet. 12). Parker testified that Carmel had approached him with an offer that might have led to a bribe, but that petitioner never offered him any money (Tr. 691–693). On cross-examination, the prosecutor asked Parker if he had told an Internal Revenue inspector that petitioner was the type of person who would manipulate a return and represent he was thereby saving the taxpayer money, and that any "monkey business" in the contractor's returns resulted from petitioner's connivance and errors of the bookkeeper. Parker denied having made such statements (Tr. 699). Although the prosecutor also asked

Parker if he had related to the inspector his views as to petitioner's general character, Parker did not answer this question (Tr. 701). The inspector testified as a government rebuttal witness that Parker had made the remarks attributed to him, but there was no further reference to petitioner's character.

ARGUMENT

1. Petitioner contends (Pet. 7–11) that the government improperly commented on his character, when that was not in issue, by its cross-examination of Agent Parker and the testimony of the Internal Revenue inspector. But, as the court below correctly held (Pet. App. A 26), the prosecutor was entitled to impeach Parker's direct testimony that petitioner had offered him no money and was not capable of committing bribery, by inquiring about and proving his prior inconsistent statements on this topic. The further question to Parker as to whether his statements to the inspector represented his impression of petitioner's character—a question which Parker did not answer—was not, as the court of appeals found, prejudicial to petitioner and did not necessitate a new trial.

2. Petitioner's claims of various errors in the trial (Pet. 11–15) were carefully reviewed by the court of appeals (Pet. App. A 27–28). As that court held, the record as a whole amply demonstrates that the matters to which petitioner objects did not improperly prejudice his case, and that he received a fair trial. This question turns necessarily on the particular circumstances of the case at hand, and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
MEYER ROTHWACKS,
CROMBIE J. D. GARRETT,
JOHN P. BURKE,
Attorneys.

MARCH 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971